File No. 17,597.

Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY CO., — PLAINTIFF IN ERROR.

vs.

EMMA HUMBLE, — DEFENDANT IN ERROR.

TERM No. 177. OCT. TERM, 1900.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

On the 9th day of April 1898, the defendant in error, Emma Humble, a married woman, went to the waiting room of the Texas & Pacific Ry. Co., the plaintiff in error, in the Station House in Texarkana, Arkansas. She arrived there about 9 o'clock, p. m. After purchasing a ticket over the railway to Shreveport, she attempted to sit down in the waiting room upon one of the chairs or benches provided for passengers and those

about to take passage on the trains. The back and bottom of the chair consisted of a single piece of bent perforated board that had been nailed or tacked on to the framework of the bench. The nails had come out, and the board had become loose or detached from the framework. As Mrs. Humble sat down the back and the bottom of the seat gave way, and she fell or continued descending down through the framework until she was so wedged in that she could not extricate herself and had to be assisted out by a person present who she didn't know. While confined in the framework of the chair she struggled to extricate herself without avail. Her legs were exposed and she strove to cover them with her dress. Quite a number of persons, strangers, were in the waiting room at the time and many of them laughed while she was in that undignified position. See testimony of Mrs. Humble, printed record pp. 10 and 12, and Willis Abbles r. 15 16. By reason of the fall she was bruised on her head, shoulder and arm. She was also ruptured, a left oblique inguinal hernia, that is incurable, so that she will always be compelled to wear a truss. The bruises were also very painful. Because of the injury, Mrs. Humble's capacity to earn money was reduced from one third to one half. R. 12, 14; 19, 21; 23, 25. She was made incapacitated from all kinds of active work, standing, lifting, stooping, walking, getting about. T. 24.

If she lifts even a chair she is in pain and has to sit down. She cannot run a sewing machine. T. 13.

The station master at Texarkana had been several times notified of the defective condition of this seat and had inspected it. This notice had been given the station master from two weeks to a month prior to the injury and no change or repairs

had been made to the seat or anything else done to give warning of its defective condition. It appeared in perfect condition at the time Mrs. Humble attempted to sit therein. R. pp. 16, 19, 13.

At this time Mrs. Humble had been a resident of the State of Arkansas for more than ten years. She had lived at Pine Bluff in said State until the October previous to her injury and during the last two years at Pine Bluff she had run a boarding house and a public hotel. She kept the boarding house over a year and the hotel for nearly a year. She closed the hotel only three or four days before she came to Texarkana. Both the boarding house and hotel was conducted by her as her sole and and seperate business, and in her own name and was in fact her business. During the time she ran the hotel, she superintended all the work, seeing to everything and often times, would take the place of some of the help, when they had quit or did not come. The condition of her health at Pine Bluff was perfect. R. 10, 12, 13.

When she arrived at Texarkana she boarded for four or five weeks. Then she started to run the Iowa House and staid there about two weeks, and shortly afterwards being *enciente*, commenced and continued boarding until the accident. During this last period she had a miscarriage and was quite ill, but was getting better and recuperating when injured. R. 15.

She was going to Louisiana to join her husband, who was then residing and making his home in that State. R. 11. On account of this negligence and for these injuries and loss to her earning capacity she brought suit against the Railway Company in the Circuit Court of Miller County, Arkansas, where the damage was received. R. 1, 3.

The railway company removed the cause to the Circuit Court of the United States for the Eastern District of Arkansas, Texarkana Division. 3-5. The answer to the complaint is as follows:

"The defendant admits that it is a railway corporation and a common carrier for passengers. It admits that the plaintiff, Emma Humble, went to the depot for the purpose of taking passage on defendant's cars, and had entered the waiting room for that purpose and (———) passage on defendant's cars at about the time named."

Defendant alleges that the plaintiff was at the time of the alleged injury, and is now a married woman.

Defendant denies that the plaintiff, Emma Humble, received any injuries to her person by reason of one of the seats breaking with her. Therefore she ought not to recover." R. p. 7.

BRIEF.

It is complained that there was error in overruling the motion of the Railway Co., to make the husband, J. K. Humble, a party plaintiff. The motion is as follows: "Now comes the Texas & Pacific Railway Company, the defendant in the above cause, and shows to the Court that both now and at the date the plaintiff was injured, Emma Humble was a married woman and her husband's name is J. K. Humble, and if the plaintiff received an injury at the time set out in her complaint for which she was entitled to recover against the defendants, then her said husband could also recover against this defendant upon the same proof.

To the end that all matters may be settled in one suit, this defendant prays that this plaintiff's husband may be made

a party plaintiff." T. 9.

We insist that this motion was properly overruled not only for the reasons set forth by the Court of Appeals but for the following additional ones.

Section 5717. Sandels & Hill's Digest of the Laws of Arkansas under the head of "Pleadings and Practice" provides:

"The defendant may demur to the complaint where it appears on its face, either. * * * *

Fourth. That there is a defect of parties plaintiff or defendant."

Section 5720 *ib*: "When any of the matters ennumerated in section 5717 do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court over the subject of the action, and the objection that the complaint does not state facts sufficient to constitute cause of action."

The complaint did not disclose the fact that Mrs. Humble was a *feme covert*. If her husband was a necessary party then under the Arkansas practice the only way to reach the defect was by answer, and not by motion.

Again the motion is to make the husband a party plaintiff. Suppose he was not willing to be made a party plaintiff and thereby make himself responsible for costs, what would have been the result? Would Mrs. Humble's complaint have been dismissed because she could not have either pursuaded or intimidated her husband into joining with her in the cause, when the Statutes of Arkansas gave her the right

to sue in her own name?

All the other assignments of error save that embraced in the dissenting opinion of Judge Sanborn we shall leave with the reasoning given in the opinion of the majority of the Court and not dissented from by Sanborn, J.

The Constitution and Statutes of Arkansas in relation to married women are as follows:

The real and personal property of any *femme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, device or otherwise, shall so long as she may choose, be and remain her separate property, and may be devised, bequeathed or conveyed by her the same as if she were a *femme sole*, and the same shall not be subject to the debts of her husband." Art. 9, Sec. 7, Constitution of Arkansas.

"The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant or conveyance from any person; that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account; that which a married woman in this state holds or owns at the time of her marriage and the rents, issues, and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interferance or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her chil-

dren by her as his agent. Sec. 4945 S. and H. Dig.

"A married woman may bargain, sell, assign and transfer her separate personal property and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name, and she may alone sue or be sued in the courts of this state on account of said property, business or services." Sec. 4946 S. & H. Dig.

"In an action brought or defended by any married woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if a judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property." Sec. 4949 S. & H. Dig.

"Where a married woman is a party, her husband must be joined with her, except in the following cases:

First. She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state.

Second. She may maintain an action in her own name for or on account of her sole and separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property." Sec. 5641 S. & H. Dig.

While we find no recorded utterance from the Supreme

Court of Arkansas involving the precise question upon which the Court of Appeals in this case differed; we do find that it has said in two instances that this legislation was for the protection of the wife's property against the husband's creditors.

Rudd vs. Peters, 41 Ark. 177.

Hoffman vs. McFadden, 56 Ark. 217.

Again Cockrill, C. J. in rendering the opinion of the Court says: "The earnings of a married woman arising from labor or services done and performed on her sole account, becomes her separate property."

Sellmeyer vs. Welch, 47 Ark. 485.

If now the proceeds or results of the earning capacity become the seperate property of the wife, it would seem that the potentiality or capacity to make those earnings must be her separate property. The legislation of Arkansas as to married women is very similar to that of Massachusetts, where the particular question involved has been decided and that able Court used the following language: "By virtue of this legislation, a married woman becomes, in view of the law a distinct and independant person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if any there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view, that

her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given her a right to act independently of him, so far his right and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her service is abridged, though his obligation to support her remains.

It is urged that she may contract to devote her whole time to work which is to be performed away from his house, and which, perhaps, may require her absence for 10 years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part without his consent. To a certain limited extent as, for example, in fixing the domicile, and in being responsible, under

ordinary circumstances, for its orderly management—the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case. The radical nature of the change effected by the legislation of this State in the legal condition of married women is illustrated in numerous decisions of which Jordan vs. Railroad Company, 138 Mass. 425; most nearly resembles the present case."

Harmon vs. Old Colony Ry. Co. 165 Mass. 100.

s. c. 42 N. E. Rep. 505.

Again, the Supreme Court of Montana, where the community law prevails, except as it may have been modified by statute, says: "The first point urged is that the Court should have decided whether the plaintiff, a married woman, could recover damages 'for any impairment of her capacity as a previously healthy woman, if she were such, to earn money.' We think she could. Plaintiff's capacity to earn is her own, and she is entitled to recover for any diminution of her capacity to work that is shown to have resulted from the injury. It is unnecessary to decide, in this case, whether the profits or use of that capacity belong to another. The capacity is her own and

for its impairment she can recover. Jordan vs. Railroad Co., 138 Mass., 425; 2 Sedg. Dam., §486.

2. It was not necessary to specially plead damages done to plaintiff by reason of any impairment of such capacity, as, obviously, where a woman is injured to such an extent as to cause her great pain and suffering in and about her womb, and back she will, until her recovery at least, suffer an impairment of her general capacity to earn money. To what extent plaintiff's capacity was impaired was therefore properly submitted to the jury as part of her general damages. Railway Co. vs. Bowlin, Tex. Cir. App.; 32 S. W., 918; Harmon vs. Railroad Co. (Mass.) 42 N. E., 505."

Hamilton vs. Railway Co., 17 Mont., 334.

It is stated in the dissenting opinion of Judge Sanborn that the loss of the wife's services and her diminished capacity to labor are the same thing, but it seems to us there is a material distinction. Her capacity to labor and earn money was the wife's at the time of her marriage. It will be the wife's still after the marriage may have been dissolved by divorce or the death of the husband. The capacity to labor and the earnings of that capacity seem to us as distinct as a piece of real estate and its crops usufruct or rents. The value of the land would largely be measured by what it would produce, or its rental. Suppose a tract of land, the separate property of the wife, to have been permanently damaged in its rental value by the actionable negligence of another, would not these damages be the wife's separate property under the laws of the state of Arkansas, or would not the wife have some such interest therein that this permanent damage should be taken into consideration by

the jury?

Suppose that Mrs. Humble had been paralyzed so that her earning capacity had been totally, completely and permanently destroyed, could her husband have recovered for this entire permanent damage? If so, these damages could be taken from the husband by execution for his separate debts, however improvidently contracted. As the laws of Arkansas in relation to married women were passed to protect their earnings and property from the husband's creditors, what protection would there be to the paralyzed dependent wife of an improvident or worthless husband, when that husband is allowed to collect, once for all, the value of the entire earning capacity of the wife for her natural expectancy of life and then to have the same at once taken from both him and her by his creditors.

Again, suppose that the husband, as is often the case, was much older than the wife. His expectancy of life is much less than that of the wife. Suppose the husband to have been seventy years of age and the wife thirty-six years, the age of Mrs. Humble. Then according to the Carlisle tables the husband's expectancy is 9.18 years, while that of the wife is 30.32 years. Under the decisions of Arkansas the husband, if entitled to recover, could only recover the amount of her probable earnings during his expectancy, and not for any period beyond.

Fordyce vs. McCants, 51 Ark., 509.

Fordyce vs. McCants, 55 Ark., 384.

If now the husband could only recover for the loss during the nine years of his expectancy, what becomes of the loss for the remaining twenty-one years of her expectancy? Has not

the wife an interest therein?

Where the plaintiff was a washwoman, working out and receiving one dollar a day for her services, which she used in the support of her family, but was a married woman and living with her husband at the time of her injury, it was held that she was entitled in a suit in her own name to recover for the loss of time occasioned by the injury. It was held that she was entitled to recover therefor, the court saying "that it makes no difference how humble or how exalted the employment may be."

Fleming vs. Shenandoah, 67 Iowa, 505.

s. c. 25 N. W. Rep., 752.

Admit that the husband in a suit in his own name for loss of *consortium* and for his wife's services in connection with their domestic affairs might recover, still could not the wife also recover in an action in her name for such services as she might have rendered for others than her husband? What legal interest could the husband have in the moneys received for such outside services or labor? If there would be any right in the wife to recover any amount for such, then there was no error in the instruction of the Court as given that the "jury will take into consideration her age and earning capacity before and after the injury was received, as shown by the proof." T. 35.

Mrs. Humble testified that her means of livelihood for the last few years had been the keeping of a hotel at Pine Bluff (T. 12) and that she had made the living for herself and children for about four years. T. 13.

This testimony tended to show that her earning capacity was of some value. It had been used in her own name.

We believe that under the married woman's statutes in most states that the moneys earned by the wife in keeping boarders become her separate property.

Hedge vs. Glenny, 73 Iowa, 513; s.c. 39 N. W. Rep. 818.

Stratton vs. Bailey, 80 Me., 345; s. c. 14, At. R., 739.

Nuding vs. Urich, 169 Pa., St. 289, s.c. 32 At. R., 409.

If, therefore, there was any evidence tending to show that Mrs. Humble had at the time of the injury any earning capacity, and that it or any portion of it belonged to her as her separate property, then was she entitled to have the jury take this into consideration, even though a portion of the result of that earning capacity, so long as exercised in purely domestic affairs, became the property of the husband.

This proposition is well expressed by Cockrill, C. J., in rendering the opinion of the Court in Fordyce vs. Jackson, 56 Ark., 594, where objection had been made to the charge upon the measure of damage.

"It was the defendant's right to have the rule for the ascertainment of damages specifically defined by the Court, so that the jury would have an accurate guide to conduct them to a proper reward. But the defendant should have requested a more specific charge, if it conceived that the jury would be misled by the general language of the charge. It is the settled practice of this state that a party cannot avail himself of an omission which he made no effort to have supplied in the trial court. Our practice is in accord with the following statement from the text of Judge Thompson's work on Charging the Jury: "Sec. 82. If the charge is not a clear misdirection—if there is a *mere tendency* to mislead the jury—the defendant must ask ad-

ditional explanatory instructions in order to avail himself of its defectiveness in a court of error, but where it *necessarily* * * * * misleads a jury, it is fatal error. Nor will a judgment be reversed because the charge is so general in its terms as to leave it doubtful whether the jury understood its application to the evidence. Here, as in the preceeding case, the remedy of the party is to ask additional instructions before the jury retires. So when the judge has laid down a proposition which, in the abstract, is clearly right, but there is something in the situation of the parties or in their relations to each other which would require a modification of it, and which has escaped the attention of judge, it is the duty of the counsel to call his attention thereto."

"Instructions given by the Court at the trial are entitled to a reasonable interpretation, and if the propositions as stated are correct, they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party, as the party aggrieved, if he supposes the instructions given are either indefinite or not sufficiently comprehensive, is always at liberty to ask that further and more explicit instructions may be given; and if he does not do so he is not entitled to claim a reversal of the judgment for any such supposed error. *Castle vs. Bullard, 23 How. 172.* Courts are not inclined to grant a new trial merely on account of ambignity in the charge of the Court to the jury, where it appears that the complaining party made no effort at the trial to have the point explained."

Flanders vs. Tweed, 16 Wall. 504.

As stated in the decision of the Court of Appeals. "She,

(Mrs. Humble,) "was entitled to some allowance on this account if the proof showed that her capacity to labor had been impaired by the injuries which she received, since it cannot be maintained under such laws as prevail in the State of Arkansas that a wife's capacity to labor is the exclusive property of her husband."

"A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated and in its precise terms. The Court is not bound to give a modified instruction varying from the one prayed."

Catts vs. Phalen, 2 How. 376.

We therefore insist that the Court of Appeals for the Eighth Circuit did not err in affirming the judgment, for we claim that the earning capacity of the wife under the laws of Arkansas was her separate property, and for its injury she is the sole person that is entitled to recover, or at least that she has some such interest therein as entitles her to have a permanent injury thereto taken into consideration by the jury.

Wherefore we pray the judgment may be affirmed.

Respectfully Submitted,

OSCAR D. SCOTT,

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